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SUPREME COURT OF THE UNITED STATES

October Term, 1953

No._____

JAMES J. BOYLE

Petitioner

vs.

WALTER LaRUE, TREASURER OF TRUMBULL COUNTY, WILLIAM TRIMBUR, AUDITOR OF TRUMBULL COUNTY, and THE VILLAGE OF HUBBARD

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

To the Honorable Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

SUMMARY STATEMENT OF THE MATTER INVOLVED

The primary matter involved herein is the validity of certain special assessments for street improvements

levied against abutting property of petitioner in the Village of Hubbard, Trumbull County, Ohio. A secondary matter concerns the jurisdiction of the Ohio intermediate appellate court which tried the case de novo on appeal by the respondents and substituted its judgment for that of the Common Pleas Court of the above county, the trial court of general jurisdiction.

Factual Matter

The following factual account is reflected by the allegations of the amended petition (R. 27) as admitted in the amended answer (R. 52) and the findings of fact stated by the chancellor in the Common Pleas Court in his opinion (R. 15).

On March 1, 1948, council of the respondent village, a municipal corporation, instituted proceedings, pursuant to sections 3812 et seq., Ohio General Code, culminating in the special assessments herein.

The initial legislation—the resolution of necessity and the ordinance determining to proceed with the improvement—provided in a single piece of legislation for the improvement of eight streets as a unit in the village by paving and installing storm sewers.

The following principal defects were present in the proceedings preparatory to the levy of the assessments:

1. Plans, specifications and profiles were neither in existence nor on file in the office of the village clerk as of March 1, 1948, at the time of passage of the resolution of necessity, or later at the time of passage of the ordi-

nance determining to proceed. Partial and inadequate estimates on portions of the improvement were later found in the office of the engineer. The plans and profiles used to construct the improvement in part were prepared at the time actual work was begun in the spring and summer of 1949, over a year after the initial legislation. R. 18.

2. The advertisement published by the village clerk did not ask for bids on the total improvement, but merely requested bids on seven designated items of materials in specified quantities and one item of mechanical labor--power shovel time. The advertisement consequently covered only a fractional portion of the materials needed and used, and made no provision at all for the manual labor, a major item in the cost. One bid for power shovel time was received and accepted, and five bids were received on the designated materials, three of which were accepted, the remaining two rejected. (R. 19.)

3. No contracts of any kind were entered into by the village for materials or labor on the improvement, and the materials were all purchased directly by the village from local material-men largely without benefit of any bids and all without benefit of contract. The manual labor was supplied by the regular village street department workers, augmented in numbers. (R. 20.)

4. During the spring and summer of 1949 four of the streets in the eight street project were completed. The remaining four streets covered by the legislation were simply abandoned. The estimated cost of improving all eight streets had been $49,484.41. The village, however, spent $45,381.29 in improving only four of the streets. R. 16.

5. The bond attorneys objected to the joinder of eight streets in a single piece of legislation with the subsequent completion of only four of the streets. On February 20, 1950, several months after completion of the improvements on four of the streets, the village council passed three new resolutions of necessity resolving to improve these four streets which had long since been completely improved in the manner now provided for in this new legislation. One of these resolutions covered two of the improved streets as a unit, the remaining one street each. On March 6, 1950, three new ordinances determining to proceed with the improvement were passed covering the four streets already long since improved. On May 15, 1950, pursuant to the above "post improvement" legislation, the village council in four separate ordinances levied the within assessments against the property of petitioner and other abutting owners. (R. 17, 45, 52.)

Procedural Matter

Petitioner first received knowledge of the foregoing assessments by way of his tax statements in April, 1951. (R. 48.) On April 18, 1951, he petitioned the Common Pleas Court of Trumbull County for an injunction restraining the collection, pursuant to section 12075, O.G.C. (R. 12.)

Amended pleadings were filed, and this case (with others) was submitted for trial as an equitable matter without jury to the Common Pleas Court. On May 8, 1952, that court entered final judgment (journal entry) finding for petitioner, declaring the assessments illegal and void, and granting perpetual injunctive relief. (R. 12.)

On May 27, 1952, the active respondent herein, the

Village of Hubbard, filed its notice of appeal to the Court of Appeals of Trumbull County on "questions of law and fact." (R. 14.) Under the Ohio practice such an appeal resulted in a trial de novo in the appellate court.

This case (and others) was submitted to the Court of Appeals for trial de novo upon the record and pleadings taken in the court below. No additional testimony of any kind was presented. (R. 6.)

Prior to the entry of judgment by the Court of Appeals petitioner filed his motion to dismiss the appeal upon the ground that the court lacked jurisdiction to try the case de novo. The motion was overruled prior to the entry of judgment by the court. (R. 9, 6.)

On January 29, 1953, the Court of Appeals entered its judgment in favor of the respondents herein. The Court of Appeals failed to write any opinion indicating the basis upon which it substituted its judgment for that of the original trial court. There is consequently no hint as to wherein the chancellor below in his well reasoned opinion had gone astray. (R. 6.)

Petitioner's motion for a new trial in the Court of Appeals was overruled on February 2, 1953. (R. 7.)

On February 3, 1953, petitioner filed his notice of appeal to the Supreme Court of Ohio as of right, alleging the involvement of constitutional questions under the state and federal constitutions, and on condition that a motion to certify the record be allowed. (R. 8.)

The Supreme Court on April 2, 1953, entered its orders

overruling the motion to certify and dismissing sua sponte the appeal as of right on the ground that no debatable constitutional question was involved. (R. 1, 2.) On May 20, 1953, the order of dismissal was made final by the order of the Supreme Court denying petitioner's application for a rehearing.

By order of this court, on July 24, 1953, the time for filing petition for a writ of certiorari was extended to include September 18, 1953. (R. 54.)

JURISDICTIONAL STATEMENT

The jurisdiction of this court is invoked under section 1257 (3), title 28, U.S.C.

The order of dismissal of the Supreme Court of Ohio herein is a final judgment, a decision on the merits (**Matthews v. Huwe,** 269 U.S. 262), and the Supreme Court of Ohio is the highest court of the state in which a decision in this case could be had. There was specially set up and claimed under the constitution of the United States a title, right, privilege or immunity—namely, that the within assessments, if permitted to stand, would result in a taking of petitioner's property without due process of law, contrary to the 14th amendment of the constitution of the United States.

The federal question sought to be reviewed herein was raised in the Common Pleas Court of Trumbull County by paragraph 58 of the amended petition (R. 51); in the Court of Appeals of Trumbull County by the same paragraph and also by petitioner's motion to dismiss the appeal to said court upon the ground that the court lacked jurisdiction to try the case de novo. (R. 9.)

In the Supreme Court of Ohio the federal question was raised again by paragraph 58 of the amended petition, by the notice of appeal (R. 8), and by the following two assignments of error incorporated in petitioner's brief in said court (under the Ohio practice):

> "Assignment of Error No. 16: The Court of Appeals erred in refusing to grant the motion of plaintiff to dismiss the appeal to the court on questions of law and fact on the assigned ground that by virtue of the constitutional amendment of 1944, amending Article IV, Section 6, of the constitution of Ohio, the courts of appeals of this state no longer have jurisdiction in the trial de novo of a chancery case."

> "Assignment of Error No. 17: The Court of Appeals erred by its final judgment in failing to find that the failure of the defendant village to obtain and preserve jurisdiction over the subject matter of the within assessment proceedings by a substantial compliance with the mandatory provisions of the Ohio Code rendered the within special assessments null and void as a taking of plaintiff's property without due process of law, contrary to the state and federal constitutions."

The Supreme Court of Ohio by its order dismissing petitioner's appeal as of right, wherein he claimed that state and federal constitutional questions were involved, necessarily determined that the levy of the within assessments did not constitute an attempt to take petitioner's property without due process of law under the 14th amendment to the constitution of the United States.

QUESTIONS PRESENTED

The questions presented herein are:

1. Did the defects and irregularities in the assessment proceedings herein so vitiate such proceedings as to deprive the assessing body, the village council, of jurisdiction over the subject matter and render the subsequent assessments null and void and their levy and attempted collection, if permitted to stand, a taking of petitioner's property without due process of law, contrary to the federal constitution?

2. Did the constitutional amendment of 1944, amending Article IV, Section 6, of the Ohio constitution, deprive the courts of appeals of that state of the power and authority to try chancery cases de novo on appeal, so that the Court of Appeals of Trumbull County lacked jurisdiction in the trial de novo herein, rendering the judgment of that court and the approving judgment of the Supreme Court of Ohio nullities and their enforcement, if not restrained, a taking of petitioner's property without due process of law, contrary to the federal constitution?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. The Supreme Court of Ohio by dismissing petitioner's appeal on the ground that no debatable constitutional question was involved, without benefit of opinion, has in effect decided a federal question of substance not heretofore clearly determined by this court, and has decided it in a way probably not in accord with the applicable

decisions of this court. The final judgment of the Ohio Supreme Court upholds an assessment levied without benefit of competitive bidding, written contracts, in which the improvement was made not by a contractor but by the assessing body itself, in which half of the proposed improvement was deserted, in which the initial legislation was passed without benefit of plans and other required data on the improvement, and in which the assessment levy was made pursuant to "post improvement" and "ex post facto" legislation. The Supreme Court of Ohio has ignored or overlooked its own clear decisions and the explicit provisions of the Ohio Code, and petitioner is without recourse to protect his property from confiscation under color of assessment unless this court intervenes in his behalf.

2. The Supreme Court of Ohio, without opinion, has by the device of a mere dismissal upheld the judgment of the Court of Appeals of Trumbull County, rendered likewise without opinion, wherein the lower appellate court through the antiquated medium of trial de novo has wiped out and nullified the judgment of the original trial judge, giving no consideration or effect to the clear findings of fact stated in his opinion (R. 15), even though the case on de novo trial was heard on evidence identical with that before the original trial judge. Under this process of judicial silence and constriction petitioner's day in court has been rendered ineffective, and petitioner has been deprived of his traditional American right to a fair review on appeal. The action of the Ohio Court of Appeals and Supreme Court made the proceedings in the Common Pleas Court, a court of general jurisdiction, a mere moot court session completely devoid of purpose.

3. The attempt of the assessing body herein to impose assessment liens against petitioner's property without compliance with provisions of the Ohio Code declared to be mandatory and jurisdictional by the Supreme Court of Ohio and other Ohio final appellate courts, if permitted to stand, violates in a flaunting manner due process of law as set out in section 3812 et seq., O.G.C., and petitioner is powerless to prevent this deprivation of his federal rights unless this court comes to his aid.

4. The amendment of 1944, amending Article IV, Section 6, of the Ohio constitution, clearly deprived the courts of appeals of jurisdiction to try chancery cases de novo on appeal, and the interpretation placed on this amendment by the Supreme Court of Ohio so as to uphold such jurisdiction (**Youngstown Municipal Ry. Co. v. Youngstown,** 147 O.S. 221, 70 N.E. 2d 648), and the decision herein, constitute an attempt by judicial fiat to give said article and section as amended a meaning contained therein neither expressly nor impliedly, with the result that the Court of Appeals herein has been invested with jurisdiction in the de novo appeal by mere court decision and not by the Ohio constitution or legislature. The question of the jurisdiction of these intermediate Ohio appellate courts affects the whole state and petitioner herein, and is worthy of this court's consideration.

Wherefore, your petitioner prays that a writ of certiorari issue to the Supreme Court of Ohio to the end that the error aforesaid may be corrected by this court.

Respectfully submitted,

JAMES J. BOYLE,
In Propria Persona.

SUPREME COURT OF THE UNITED STATES

October Term, 1953

No._____

JAMES J. BOYLE

Petitioner

vs.

WALTER LaRUE, TREASURER OF TRUMBULL COUNTY, WILLIAM TRIMBUR, AUDITOR OF TRUMBULL COUNTY, and THE VILLAGE OF HUBBARD

Respondents

BRIEF OF PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

OPINIONS OF COURTS BELOW

The only opinion herein was that of the Common Pleas Court of Trumbull County, Ohio (R. 15-26), and is unreported.

JURISDICTION

The statutory provision which is believed to sustain the jurisdiction of this court is Section 1257 (3), Title 28, U.S.C. Cases sustaining such jurisdiction are: **Norwood v. Baker,** 172 U.S. 269; **Mosher v. Phoenix,** 287 U.S. 29; **Risty v. Chicago, R.I. & P.R. Co.,** 270 U.S. 378; **Fidelity Nat. Bank & T. Co. v. Swope,** 274 U.S. 123.

Final action was taken herein by the Supreme Court of Ohio on May 20, 1953, and this court has extended the time for filing the foregoing petition to and including September 18, 1953.

An attempt to enforce an illegal and void assessment is a violation of petitioner's federal protected right to due process under the 14th amendment of the federal constitution which this court has authority to consider and prevent. **Lyon v. Alley,** 130 U.S. 177; **O'Brien v. Wheelock,** 184 U.S. 450; **Ogden City v. Armstrong,** 168 U.S. 224.

STATEMENT OF THE CASE

Petitioner adopts by reference the statement of the case presented in the foregoing petition (pp. 2-6).

SPECIFICATION OF ERRORS

A. The Supreme Court of Ohio erred in dismissing petitioner's appeal as of right and thereby finding that due process of law under the federal constitution had been observed by the assessing body in the assessment proceedings leading to the levy of the within assessments and the imposition of liens upon petitioner's property.

B. The Supreme Court of Ohio erred in dismissing petitioner's appeal as of right and finding thereby that the Court of Appeals of Trumbull County, Ohio, had jurisdiction to try the within case de novo on appeal, and that accordingly due process of law under the federal constitution was not violated.

SUMMARY OF ARGUMENT

A. Due process of law in making improvements and assessing their cost against abutting property is set out in precise detail in the assessment provisions of the Ohio General Code, 3812 et seq. Where the assessing body, the village council, failed to comply substantially with the provisions therein declared to be mandatory and jurisdictional by the Supreme Court of Ohio and other authoritative Ohio courts, the assessing body never acquired, or was ousted from, jurisdiction over the subject matter of the assessment, so that the levy and liens of the assessments are nullities, which, if permitted to stand, will constitute a taking of petitioner's property without due process of law and deny to petitioner equal protection of law under the federal constitution.

B. Due process of law in the rendition of a judgment requires that the court have jurisdiction of the subject matter before it. The 1944 amendment of the Ohio constitution, amending Article IV, Section 6, took away from the Ohio courts of appeals jurisdiction to try chancery cases de novo on appeal. The decisions of the Ohio Supreme Court upholding such jurisdiction, when this grant of power and authority is not contained either expressly or impliedly in such amendment, are merely attempts by judicial decree to confer jurisdiction on a lower court, are

not binding on this court, and in the present case, if permitted to be controlling, will result in a taking of petitioner's property without due process of law.

POINT A

Failure of the assessing body herein to comply with the mandatory and jurisdictional requirements of the Ohio Code rendered the within assessments null and void.

In **Lyon v. Alley**, 130 U.S. 177, this court said:

> "The provisions of statutes as to the form and mode of assessments . . . are, according to the highest authority, designed for the benefit of the taxpayers, and the protection of their property from sacrifice."

And in **Ogden City v. Armstrong**, 168 U.S. 224:

> " . . . the first and most important question to consider is whether the city council had jurisdiction to assess and collect the paving tax . . . .
>
> "What is complained of is no mere irregularity or error in the assessment. As we have seen, there was an entire want of jurisdiction in the common council to proceed for want of the assent of the requisite proportion of property owners, and the assessment and tax were, therefore, void."

In the early case of **French v. Edwards**, 13 Wall. 506, this court spoke of such mandatory provisions:

> " . . . when the requisitions prescribed are intended

for the protection of the citizen, and to prevent a sacrifice of his property, and by a disregard of which his rights might be and generally would be injuriously affected, they are not directory but mandatory. They must be followed or the acts done will be invalid. The power of the officer in all such cases is limited by the manner and conditions prescribed for its exercise."

Ohio being a code state, the procedure for making improvements and levying special assessments is entirely statutory (**Curry v. Lybarger**, 133 O.S. 55, 11 N.E. 2d 873; 3812 et seq., O.G.C.). The Village of Hubbard is a non-charter municipality subject to the general municipal law of the state (Part First, Title XII, General Code).

The serious defects in the assessment proceedings herein enumerated at page 2 of the foregoing petition refer to mandatory and jurisdictional provisions of the Ohio law. (See R. 17, 19, 21.)

Lack of Plans

Section 3816, O.G.C., in so far as pertinent, reads:

"At the time of the passage of such resolution (resolution of necessity), council shall have on file in the office of . . . the clerk in villages, plans, specifications, estimates and profiles of the proposed improvement, showing . . . the improvement after completion, with reference to the property abutting thereon . . ."

The Supreme Court of Ohio in **Kasch v. Akron**, 100 O.S. 229, 126 N.E. 61, in the 2d syllabus held that

> "It is essential to the validity of proceedings ordering an improvement authorized by Section 3812, General Code, that plans, specifications, estimates and profiles . . . shall be on file in the office of the . . . clerk in villages, at the time of the passage of the resolution declaring such improvement necessary."

This decision of the Ohio Supreme Court is still in full force and effect, and has been followed and reasserted with greater positiveness by other Ohio appellate courts. **Swigart v. Barberton,** 44 O.L.A. 253, 51 N.E. 2d 419; **Morgan v. Akron,** 29 O.L.A. 31; **Pardee v. Cuyahoga Falls,** 16 O.L.A. 355; **Lichtenwalter v. Akron,** 25 O. App. 108, aff. 117 O.S. 357; **Daehler v. Portsmouth,** 45 O. App. 15, 185 N.E. 52, aff. 126 O.S. 217.

Competitive Bidding and Contracts

Failure to provide for competitive bidding and failure to enter into written contracts for the improvements invalidated the assessments herein. 63 C.J.S. 1147; 43 Am. Jur. 764-793.

Ohio has provided by statute the precise manner in which bids shall be advertised for and the manner in which public contracts shall be awarded and executed on improvements whose cost is to be paid for by assessment—sections 3833, 4328, 4329, 4330, 4221 and 4222, O.G.C. True competitive bidding on the entire improvement and written contracts are required. 28 Ohio Jurisprudence 915, 919; 33 Ohio Jurisprudence 635, 636, 664.

These provisions of the Ohio code are mandatory and

jurisdictional. **Steese v. Oviatt,** 24 O.S. 252; **Upington v. Oviatt,** 24 O.S. 232; **State v. Board of Public Service,** 81 O.S. 218, 90 N.E. 389; **Lancaster v. Miller,** 58 O.S. 558, 51 N.E. 52; **Towne v. Cleveland,** 3 O.L.A. 117; **Riesenberg v. Cincinnati,** 32 O.N.P. (NS) 24; **Johnson City v. Carnegie Realty Co.,** 166 Tenn. 655, 64 S.W. 2d 507.

There is no provision in the Ohio Code for levying assessments to pay for work done directly by a municipality. (See R. 22.)

Abandonment of Improvement

Abandonment of improvement of four of the eight streets covered by the initial legislation invalidated the subsequent assessments, as did the attempt to levy assessments pursuant to "post improvement" legislation differing radically from that initially passed.

In **Elyria Gas and Water Co. v. Elyria,** 57 O.S. 374, 49 N.E. 335, the court held:

> "The subsequent proceedings must conform to the resolution; it cannot be altered or amended by them. A substantial departure from the resolution leaves the proceedings without foundation to support them."

The effect of failure to complete an intended improvement is ably discussed and declared to be fatal to the subsequent assessment in **Johnson v. Village of New Concord,** 9 O. App. 9, 176 N.E. 689. See also **Newton v. Cuyahoga Falls,** 15 O.L.A. 86.

The determination to make an improvement must

precede the improvement itself, so that the "post improvement" legislation herein pursuant to which the assessments were levied (R. 45) had no validity, and the assessment ordinances passed pursuant thereto could have no higher authority than their source and were in reality a species of ex post facto legislation. **Donohue v. Brotherton,** 7 O.N.P. 367; **Folz v. Cincinnati,** 2 Handy (Ohio) 261.

POINT B

Between 1912 and 1944, Article IV, Section 6, of the Ohio constitution read in part as follows:

> "The courts of appeals shall have original jurisdiction in quo warranto, mandamus, habeas corpus, prohibition and procedendo, **and appellate jurisdiction in the trial of chancery cases,** and, to review, affirm, modify, or reverse the judgments of the courts of common pleas . . . as may be provided by law . . . " (emphasis added).

The 1944 amendment replacing this section of Article IV changed the above provision as follows:

> "The courts of appeals shall have original jurisdiction in quo warranto (and the other original actions), **and such jurisdiction as may be provided by law to review, affirm, modify, set aside, or reverse** judgments . . . of courts of record inferior to the court of appeals within the district, and judgment of the courts of appeals shall be final in all cases, except cases involving questions arising under the constitution of the United States or of this state . . . **All laws now in force, not inconsistent herewith, shall**

continue in force until amended or repealed; provided, that all cases . . . pending before or in any . . . court on the first day of January, 1945, shall be heard, tried and reviewed in the same manner and by the same procedure as is now authorized by law" (emphasis added).

As is evident, the 1944 amendment deleted the words "appellate jurisdiction in the trial of chancery cases"—the basis for de novo trial on appeal in Ohio.

In **Youngstown Municipal Ry. Co. v. Youngstown,** 147 O.S. 221, 70 N.E. 2d 649, the Supreme Court of Ohio held that this provision of the 1912 amendment, even though removed from the 1944 amendment, was still in effect, that until the legislature acted to deprive the courts of appeals of such jurisdiction to try matters de novo on appeal these courts had the same power in the re-trial of chancery cases as under the 1912 amendment of the constitution. The principal basis for this conclusion was that the final clause of the 1944 amendment—"all laws now in force, not inconsistent herewith, shall continue in force"—included the very section of Article IV which the 1944 amendment purported to amend. "Law" was said to be used in a broad sense rather than in the customary sense of statutory law. No authority was cited for this unusual interpretation.

For a critical analysis of the above amendments this court is referred to **Sicker v. Powers,** 74 N.E. 2d 638; **Zaremba v. Cleveland,** 71 N.E. 2d 514; 31 Ohio Opinions 358, 561; 9 O.S.L.J. 157.

The Ohio legislature has not acted since 1944 pursu-

ant to the power conferred on it by the 1944 amendment. If the courts of appeals have any jurisdiction to try cases de novo on appeal, it is by virtue of some "law" in existence at the time of the 1944 amendment. There are no such laws of a statutory nature, except a few procedural statutes which do not confer jurisdiction. 31 Ohio Opinions 561.

The Supreme Court of Ohio has said that "all laws now in force" includes Article IV, Section 6, as it existed before the 1944 amendment. But how could this section be repealed and its effect be continued? "All laws now in force" shall continue until "amended or repealed." Since the 1912 constitutional law was repealed by the 1944 amendment, is that not conclusive that "all laws" could not mean the provisions of the constitution thus repealed? Could the 1912 amendment again be "repealed or amended," if it was repealed concurrently with the adoption of the 1944 amendment? If so, by what authority is it proposed to amend or repeal it? The legislature cannot amend or repeal a constitutional provision.

The proviso in the 1944 amendment—"all cases pending on January 1, 1945, shall be **heard, tried and reviewed** in the same manner and by the same procedure as is now authorized by law" (emphasis added)—was meaningless unless the 1944 amendment instituted a new method of hearing, trying and reviewing cases.

The amendments of 1912 and 1944 are clearly inconsistent, since the one is a denial of the other. Under the 1912 amendment the courts of appeals derived their jurisdiction from the constitution; under the 1944 amendment from the General Assembly. **Sicker v. Powers**, 74 N.E. 2d 638.

As stated in 11 Am. Jur. 644 regarding amendments:

"If it covers the same subject as was covered by a previously existing constitutional provision, thereby indicating an intent to substitute it in lieu of the original, the doctrine of implied repeal, though not favored, will be applied and the original provision deemed superseded" (**Badger v. Hoidale,** 88 F. 2d 208, 109 A.L.R. 798).

Finally the principle of "expressio unius est exclusio alterius" applies here. Expression clearly stated of the courts' powers precludes reading into the provision additional powers.

Petitioner submits that the Supreme Court of Ohio is the only source of the de novo trial jurisdiction of the courts of appeals of that state, and not the Ohio constitution, and therefore judgments rendered pursuant to such court created jurisdiction are nullities.

CONCLUSION

Petitioner invokes the intervention of this court in the present case on the ground that his property is clearly being taken without due process of law under the 14th amendment of the constitution of the United States.

The record herein, together with all the various exhibits, the admissions of the respondent village at all stages of this case, and the clear findings of fact of the original trial judge, show conclusively that plans for the improvement were prepared on only half of the total planned improvement and then only at the time work was begun, that there was no competitive bidding or written contracts, that the village did the work itself and completed only one half of the entire improvement, and that

the assessments are based directly on "post improvement" legislation.

Petitioner's day in court has been indeed a brief one, abbreviated at either end.

The Court of Common Pleas heard all the evidence and testimony firsthand in this case and wrote an able opinion upholding petitioner's position. The Court of Appeals wiped out the force of this judgment by the questionable device of trial de novo and the entry of a contrary judgment without opinion (cf. Canon 19, Canons of Judicial Ethics of the American Bar Association). The Supreme Court of Ohio without opinion dismissed petitioner's appeal on the sole ground that no debatable constitutional question was involved.

Petitioner submits to this court that the within cause involves questions that are potentially nationwide in importance. This court apparently has not dealt extensively or particularly in recent years with the invalidity of assessments due to a lack of jurisdiction in the assessing body; and the question of the jurisdiction of the Ohio intermediate appellate courts in de novo trials is one of vital concern to the entire state.

Petitioner therefore respectfully suggests that this case is worthy of the court's consideration, as petitioner is otherwise without relief against the clear errors of the Ohio appellate courts unless this court intervenes.

Respectfully submitted,

JAMES J. BOYLE,
In Propria Persona.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 353

JAMES J. BOYLE,

Petitioner,

vs.

THE VILLAGE OF HUBBARD, OHIO, WALTER LaRUE, TREASURER OF TRUMBULL COUNTY, OHIO AND WILLIAM TRIMBUR, AUDITOR OF TRUMBULL COUNTY, OHIO,

Respondents

BRIEF IN OPPOSITION TO GRANTING WRIT OF CERTIORARI

To the Honorable Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your Respondent respectfully shows:

Statement of Facts

During the month of March, 1948, the Petitioner herein and numerous other property owners abutting upon Princeton Avenue, Mill Street and East Park Street, all duly

dedicated streets within the Village of Hubbard, Ohio, signed Petitions requesting the Village of Hubbard, Ohio, to pave the above-mentioned streets and levy the cost thereof against the abutting property owners, waiving all irregularities and constitutional limitations as to cost of said improvement.

Whereupon, Council passed a Resolution of Necessity covering the streets mentioned, and passed an Ordinance determining to proceed with the improvement. Notice of the intent of Council was served upon all property owners upon the streets in question, and notice by publication was made with reference to abutting property owners not residents of Trumbull County. During the same Summer of 1948, bids were invited to furnish labor and material for said proposed improvement. No bids were received for furnishing both labor and material, but certain bids were received for furnishing materials. During the Spring of 1949, Council proceeded to improve the above-mentioned streets by Force Account. At no time during the legislative proceedings and during the entire Summer of 1949, when the improvements were being made, did any property owner complain concerning the improvement or voice any disapproval with the project. Petitioner herein was personally served with notice that the intended improvement was to be made; was physically present all during the time the improvement was in the process of construction. After the completion of the improvement, an assessment was made against the abutting property owners and same was certified to the County Auditor to be placed upon the Tax Duplicates. At this point, the Village of Hubbard, Ohio, advertised and sold bonds in the sum of Forty-five Thousand Dollars ($45,000.00) to finance and pay for the improvement. A transcript of the proceedings was certified to the Law Firm of Squire, Sanders and Dempsey, Cleveland, Ohio, which firm

approved the transcript and the bonds were then signed and delivered to the Bond House, who purchased same.

During the Spring of 1951, the first payment on said assessment appeared upon the tax duplicate and was paid by all abutting property owners, except James J. Boyle, Petitioner in this case.

Shortly thereafter, the Petitioner herein secured a temporary injunction enjoining Respondent, Village of Hubbard, Ohio, from collecting the special assessment, said injunction being granted by the Trumbull County Court of Common Pleas, without Petitioner's furnishing bond. Upon final hearing, the Court of Common Pleas of Trumbull County, Ohio, made the injunction permanent.

Upon appeal to the Court of Appeals of Trumbull County, Ohio, that court reversed the Common Pleas Court and entered final judgment for the Respondents. Upon appeal to the Supreme Court of Ohio, said Court overruled a Motion to Certify the Record and entered final judgment for the Respondent, Village of Hubbard, Ohio.

Brief in Opposition to Granting Writ of Certiorari

In 1946 the Supreme Court of Ohio was called upon to construe and interpret the provision of the Ohio Constitution with reference to the Appellate jurisdiction of the Ohio Court of Appeals. The Ohio Supreme Court ruled upon the 1944 Amendment of Article IV, Section 6, of the Ohio Constitution, holding that the Ohio Court of Appeals retained jurisdiction upon trial De Novo of an equity case on appeal from the Court of Common Pleas, such as in the Hubbard Village case.

The Court further held that said jurisdiction of the Ohio Court of Appeal would continue until the Ohio Legislature saw fit to take this jurisdiction away from the Court. This matter has been regarded as a settled issue within the

Courts of the State of Ohio since the year 1946, when the Ohio Supreme Court decided the case of *Youngstown Municipal Railway* v. *City of Youngstown*, 147 O. S. 221.

It is interesting to note that in the Ohio Courts the Petitioner did not question the jurisdiction of the Ohio Court of Appeals to hear a case on trial de novo until December 29, 1952—the Court of Appeals, on December 12, 1952, nearly three weeks prior thereto, having made the following Order on its docket:

> "Finding and decree for defendants. Exceptions." *R-9.*

Petitioner herein submits two questions upon which this Court is asked to make a determination as to whether a writ of certiorari be granted.

Respondent respectfully submits that no Federal question is involved in this particular issue, and that this matter is strictly a matter within the jurisdiction of the Courts of Ohio.

In the case of *Gormley* v. *Clark*, 134 U. S. Report 338, this court held:

> "Upon construction of the Constitution and laws of a state, this Court as a general rule follows decisions of the highest court of the state, unless they conflict with or impair the efficacy of some provision of the Federal Constitution."

We quote from *Minnesota* v. *National Tea Company*, 309 U. S. 551, wherein Justice Douglas at page 557 of his Opinion with reference to this question states:

> "It is important that this court not indulge in needless dissertations on Constitutional law. It is fundamental that State Courts be left free and unfettered by us in interpreting their State Constitutions."

Upon question No. 1 presented by Petitioner, this Court will note that Petitioner, in an effort to invoke the jurisdiction of this Court, asks a review of the State Court proceedings involving matters pertaining to the laws of the State of Ohio.

The sole question upon which this case was tried and upon which the Appellate Courts of the State decided it was:

Did the Village of Hubbard, Ohio, substantially comply with the statutory requirements in making the street improvement and levying assessments therefor? The Common Pleas Court of Trumbull County, Ohio, said no, and the Court of Appeals, on the same evidence, said yes, and was upheld by the Supreme Court of Ohio.

Both the Court of Appeals and the Supreme Court of Ohio in their review of Petitioner's case, found no violation of Ohio statutory requirements to justify their granting the relief sought by the Petitioners, and as a result entered final judgment for the Respondents. At no point in the record is there any testimony which would indicate that anything but a matter of State Law was involved, and nowhere within the record was a Federal question raised or decided by any of the State Courts. The most that can be said for Petitioner is that he belatedly recognized that time was running out for him, and inserted in the Appellate Courts some late claims of violation of Federal rights, hoping to preserve his right of appeal beyond the State Courts.

An examination of the Opinion of the Chancellor in the lower court, who found for the Petitioner in the first instance, does not reveal anything that would even remotely suggest that a Federal question was involved in this case. It becomes apparent, therefore, even upon a cursory examination or exhaustive study of the facts upon which the writ of certiorari is sought by the Petitioner that this Court is

asked to review a case resting clearly and solely upon Ohio Law and completely devoid of any Federal question.

From an examination of the Petition in this cause, it is difficult to determine by what means the Petitioner feels that his Constitutional rights have been impaired by reason of the Village making the improvement to Petitioner's property, and it is equally difficult to ascertain just what relief Petitioner seeks.

In the instant case, neither the Court of Common Pleas, Court of Appeals, or Supreme Court of Ohio, found that there was a violation of Petitioner's rights under the Federal Constitution. The record before the Ohio Courts shows that the improvement petitioned for by the Petitioner was made and that benefits were conferred upon the property of the Petitioner, and that the Village of Hubbard, Ohio, thereby possessed power under the State Law to assess the abutting property for the benefits conferred.

An illustration of the fact that "due process" did not enter this case is to be found in the Chancellor's Opinion in the lower Court (R-25) from which we quote:

> "It is true that the property owners wanted this improvement, knew that the improvement was being made and watched it while it was being constructed without raising any objection to its completion. It would only seem equitable that these owners should pay the expense of the improvement rather than succeed in securing an improvement to their property at the expense of the taxpayers of Hubbard Village. The various irregularities heretofore mentioned did not prevent the completion of the improvement nor diminish its perfect construction."

The Chancellor's findings, upon which Petitioner leans heavily, as indicated above, refute any inference that Petitioner suffered a "taking of his property without due process of law".

The Petitioner, in asking for a writ of certiorari, states in substance that when a municipality assesses abutting property for an improvement, even though the State Courts find that said improvement is proper in every respect and non-confiscatory, as in the *Hubbard Village* case, nevertheless by virtue of the improvements being made, the XIVth Amendment of the Constitution of the United States is invoked.

It is a fundamental proposition that in order to invoke the jurisdiction of the United States Supreme Court, there must appear on the face of the record:

1. That the validity of a statute of a State is brought into issue as being repugnant to the Constitution of the United States, or that some right, title or immunity of a citizen of the United States has been violated.
2. That the question was decided by the State Court.
3. That the question was raised and must have been decided to induce the judgment.

The bare claim that judgment of the highest court operated to take property without just compensation in order to justify the Federal Supreme Court in taking jurisdiction is not sufficient. The question must be real and substantial and not so utterly without merit as to be frivolous: *Consolidated Turnpike Company* v. *Norfolk*, 228 U. S. 596.

In the case of *F. J. Oxley Stove Company* v. *Butler County*, 166 U. S. 648, it was held that where the record failed to show that any reference was made in the Court of original jurisdiction to the Constitution of the United States, and it could not be inferred from the Opinion of the highest court of the State that that court was informed by the intention of the parties that any Federal right, privilege or immunity was intended to be asserted * * * United States Supreme Court was without jurisdiction to review the decision of the State Court."

In *Grunday and M. Canal Company* v. *Patton Paper Company,* 172 U. S. 58, the Court held that the statutory requirement for Federal review is not met if such declaration is so general in its character that the purpose of the party to assert a Federal right is left to mere inference.

This would appear to be the situation in the *Hubbard Village* case, where Petitioner merely alleged a taking of his property without due process of law, in violation of the Federal Constitution, when as a matter of fact, no proof whatever on this allegation was offered in the trial of this cause, and the Courts of Ohio did not find that any such issue appeared in the record or was involved in making a determination of the cause, and in no way was the decision in any of the courts dependent upon the question of Federal rights.

"It is settled in order to justify the United States Supreme Court in reviewing the judgment or decree of a State Court, the record must show that the judgment rested upon the disposition of a Federal question." *Marsh* v. *Nichols,* 140 U. S. 344.

In the instant case, the Petitioner is requesting the Supreme Court of the United States to grant a writ of certiorari, despite the fact that no Federal question is involved. Petitioner simply does not agree with the position taken by the State Court upon a non-Federal question, and, therefore, requests a review.

The Petitioner summons to his aid in his argument for allowance of a writ the fact that the Court of Appeals reversed the Common Pleas Court without Opinion. However, this is a matter of common practice throughout every state in the Union, and a practice that is clearly within the discretion of the Court as to whether an Opinion should be written and by no stretch of the imagination does the failure to write an Opinion present a Federal question.

Justice Frankfurter, in the case of *Williams* v. *Kiser*, 323, U. S. 47, at page 479, commented as follows on this question:

> "To be sure the Supreme Court of Missouri did not write an Opinion in support of its conclusions that the writ for habeas corpus fails to state a cause of action. There is nothing significant about that, and it does not affect the basis or scope of this Court's review of State Court decisions.
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> During 1942 judicial year, the Supreme Court of Missouri disposed of 300 cases by Opinion; 217 without Opinion. This Court disposed of 218 with Opinions; 146 cases without Opinions (apart from certiorari). If the determination by the Missouri Court can reasonably be justified on failure to comply with a requirement of Missouri law, it must be justified. * * *

Quoting further from Justice Frankfurter's Opinion on page 481:

> If a decision of a State Court can rest upon a State ground, it is our duty to conclude that it does so rest. It is our duty not to assume that the State Court rejected a claim under the U. S. Constitution."

The following recent decisions of this Court confirm the reasoning of the Supreme Court on jurisdictional requirements necessary to invoke the Appellate jurisdiction of this Court: *Southwestern Bell Telephone Company* v. *Oklahoma*, 303 U. S. 206; the Court held at page 212:

> "We have repeatedly held that it is essential to the jurisdiction of this Court in reviewing a decision of a court of decision that it must appear affirmatively from the record, not only that a Federal question was presented for decision to the highest court of the State having jurisdiction, but that its decision of a Federal question was necessary to the determination of the cause; that the Federal question was actually decided

> or that the judgment as rendered could not have been given without deciding it."

Radio Station W. O. W. Inc., v. *Johnson*, 326 U. S. 120, at page 129, the Court held:

> "This brings the situation clearly within the settled rule whereby this Court will not review a State Court decision resting on an adequate and independent non-Federal ground, even though the State may have also summoned to its support an erroneous view of Federal law."

Lynch v. *N. Y.* 293, U. S. 521:

> "Where the judgment of the State Court rests on two grounds, one involving a Federal question, and the other not, and the ground independent of a Federal question is sufficient in itself to sustain the judgment, this Court will not take jurisdiction."

Williams v. *Kiser*, 323 U. S. 471, the Court held at page 478:

> "It is a well-established principal of this Court that before we will review a decision of a State Court, it must affirmatively appear from the record that the Federal question was presented to the highest court of the state having jurisdiction, that its decision of the Federal question was necessary to its determination of the cause."

Conclusion

Respondent respectfully submits that the Petitioner's attempt to invoke the jurisdiction of the United States Supreme Court is merely an unmeritorious resort to prolong the litigation commenced in the State Court.

Petitioner is attempting herein to secure a review by this Court of a matter that was resolved strictly upon established State law and decision of the State Courts wherein

no Federal question is involved. The Petitioner, an Attorney at Law, if he felt that he was being deprived of his property without due process in violation of the XIVth Amendment of the United States Constitution, would certainly have long before the improvement was made, or during the time the improvement was in the process of construction, petitioned a Court to enjoin the improvement, if said improvement was injurious to his property rights, rather than wait three years after the improvement was made to complain to a Court that the Village of Hubbard, Ohio, be restrained from assessing his property for an improvement that he himself petitioned Council of the Village of Hubbard, Ohio, to make.

Respectfully submitted,

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Village of Hubbard, Ohio.